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FEDERAL RECENT DEVELOPMENTS

ADMINISTRATIVE LAW

Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir. 1989).

Seva Resort, Inc., a Nevada Corporation, and Seva Development Corporation, an Arizona corporation, the plaintiffs, entered into a master lease agreement with the Navajo Nation. This agreement was the result of negotiations between the Navajo Nation, the plaintiff corporations, and the National Park Service to develop a marina resort complex on the adjacent Indian and federal lands located at Antelope Point in Glen Canyon National Recreation Area.

Separately from the lease agreement, a concession and sub-concession contract was signed and submitted to the National Park Service by the Navajo Nation for the mandatory 60-day review by Congress pursuant to the Concessions Policy Act of 1965.¹ Congress made no changes to the concession or sub-concession contracts. However, the Secretary of the Interior (Donald Hodel) refused to sign the contracts because a dispute arose between the Navajo Nation and the plaintiff corporations. The National Park Service had requested that the Secretary decline to sign the contracts because the dispute could not be resolved.

The plaintiffs sought to compel the Secretary of the Interior to sign and execute a concession contract concerning the federal and Indian trust lands entered into between the National Park Service and the Navajo Nation pursuant to 16 U.S.C. § 20-20f. The plaintiff corporations also sought to compel the Secretary to approve a subconcession contract between the plaintiffs and the Navajo Nation pursuant to 25 U.S.C. § 415.² The District Court denied the plaintiffs' motion for an injunction against the Secretary.³

The issues before the Ninth Circuit were (1) whether the Secretary had the authority to decline signing the contract; (2) whether the Secretary had a duty to sign the concession contract after the 60-day waiting period expired without disapproving the contract; and (3) whether the Secretary sufficiently considered

1. 16 U.S.C. § 20 (1982 & Supp. IV 1986) (codified at 36 C.F.R. §§ 51.1 and 51.4(d) (1988)).

2. 25 U.S.C. § 415 (Supp. IV 1986) (codified at 25 C.F.R. 162.14 (1988)).

3. *Seva Resorts, Inc. v. Hodel*, 675 F. Supp. 1542, 1551 (D. Ariz. 1987).

congressional policy in declining to sign the subconcession contract.

The court of appeals rejected the plaintiffs' argument that the Secretary could not decline to sign the concession contracts because the plaintiffs confused the master lease approval with the concession contracts.⁴ The lease fell within 25 U.S.C. § 415 but the concession contracts were subject to 16 U.S.C. § 20.⁵

The Ninth Circuit found that "the District Court correctly determined that the Secretary acted within his statutory authority" when the Secretary concluded that he had the power to terminate negotiations before he signed the concession contract and after the mandatory 60-day waiting period.⁶ The court conducted an independent review of the factors to be considered in congressional concession policy and found that the Secretary properly considered all factors.⁷ The Ninth Circuit held that the Secretary's decision was not an abuse of discretion, arbitrary or capricious, and affirmed the district court.⁸

FEDERAL COURT JURISDICTION: MAJOR CRIMES ACT

United States v. Ant, 882 F.2d 1389 (9th Cir. 1989).

A Northern Cheyenne Tribal Court convicted Francis Ant of assault and battery of his niece after he pleaded guilty to the offense without counsel to represent him. Under tribal law¹ and the Indian Civil Rights Act (ICRA)², the right to appointed counsel for tribal criminal proceedings is not required, but assistance of counsel could be obtained at the option and own expense of the Indian.³ A federal indictment was filed charging Ant with voluntary manslaughter under 18 U.S.C. §§ 1112-1153 and Ant was furnished with appointed counsel.⁴

The issue before the court was "whether an uncounseled guilty plea in tribal court in accordance with tribal law and the ICRA, but which would have been unconstitutional if made in federal

4. *Seva Resorts, Inc. v. Hodel*, 876 F.2d 1394, 1397 (9th Cir. 1989).

5. *Id.*

6. *Id.* at 1398.

7. *Id.* at 1399.

8. *Id.* at 1399-1401.

1. Revised Law and Order Ordinances of the Northern Cheyenne Tribe of Montana, ch. 1, § 9 (1987).

2. 25 U.S.C. § 1302 (1982).

3. 25 U.S.C. § 1302(8) (1982).

4. *United States v. Ant*, 882 F.2d 1389, 1391 (9th Cir. 1989).

court, can be admitted as evidence of guilt in a subsequent federal prosecution involving the same criminal acts.”⁵

The Ninth Circuit accepted the district court’s finding that the guilty plea was valid under the tribal law and the ICRA.⁶ However, after examination of the possible violation of the sixth amendment⁷ by the uncounseled guilty plea, the court held that the guilty plea was constitutionally infirm.⁸ The burden of proof was on the government to establish that there was a waiver⁹ and the court stated the facts did not support a waiver.¹⁰

The court reversed the finding of the district court that the guilty plea was admissible as evidence in a federal prosecution holding that the plea would have been in violation of the sixth amendment if made in a federal court.¹¹

GAMING

Enterprise Management Consultants, Inc. v. Hodel, 883 F.2d 890 (10th Cir. 1989).

Enterprise Management Consultants, Inc. (EMCI) managed a bingo operation located on Citizen Band Potawatomi trust land. EMCI sought contract approval for two bingo management contracts from the Secretary of the Interior as required by 25 U.S.C. § 81.¹ Unapproved contracts are null and void under

5. *Id.*

6. *Id.* at 1392.

7. The sixth amendment of the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

8. *Ant.*, 882 F.2d at 1393.

9. The court used as a standard for waiver a “knowingly and intelligently, with an understanding of the charges, the possible penalties, and the dangers of self-representation.” *Id.* at 1394 (quoting *United States v. Dujanovic*, 486 F.2d 182, 186-87 (9th Cir. 1973)).

10. *Id.* at 1394.

11. *Id.* at 1395-96.

1. 25 U.S.C. § 81 states in relevant part:

No agreement shall be made by any person with any tribe of Indians . . . for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows:

First. Such agreements shall be in writing, and a duplicate

section 81.² EMCI filed suit seeking injunctive relief prohibiting Donald Hodel, Secretary of the Interior, and the Citizen Band Potawatomi Tribe of Oklahoma (Tribe) from enforcing disapproval of the contracts; mandamus relief requiring the Secretary to approve the contracts; and declaratory relief stating that section 81 did not apply to the contract.

The issues before the court were (1) whether tribal sovereignty barred EMCI's suit, and (2) whether the Tribe was an indispensable party under Rule 19.³ The district court granted the Tribe's motion to dismiss on the basis of sovereign immunity.⁴ The district court also held that it lacked jurisdiction over the suit against the federal officials, and also denied the Tribe's request for sanctions under Rule 11⁵ for filing a frivolous appeal.

The Tenth Circuit agreed with the district court's decision that EMCI's suit was barred by sovereign immunity finding that "... Indian Nations are exempt from suit."⁶ The court also held that "... a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"⁷ The court distinguished *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone*

of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

2. 25 U.S.C. § 81 also stated in relevant part: "All contracts or agreements made in violation of this section shall be null and void . . ."

3. FED. R. CIV. P. 19. Rule 19(b) sets forth a four-factor test to determine when a party is considered "indispensable". The factors include:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

4. *See* Enterprise Management Consultants, Inc. v. United States, 685 F. Supp. 221 (W.D. Okla. 1988).

5. FED. R. CIV. P. 11. Rule 11 provides in pertinent part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

6. *Enterprise Management Consultants, Inc. v. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (omitting citation)).

7. *Id.* at 890.

*Tribes*⁸ because the "exception" to sovereign immunity was not met.⁹

In examining the indispensable party issue, the court held that the Tribe was a necessary party because of their interest in maintaining sovereign immunity outweighed EMCI's or federal interests.¹⁰ The Tenth Circuit also affirmed the denial of rule 11 sanctions because the trial court's discretion was not abused when it declined to impose sanctions.¹¹

PROBATE APPEALS FEDERAL COURT JURISDICTION

Kicking Woman v. Hodel, 878 F.2d 1203 (9th Cir. 1989).

Relatives of a deceased Native American disputed the intestate succession to interest in allotted trust land held by a Blackfeet tribal member. The administrative law judge determined that the decedent's natural son was the sole heir. The decedent's brother and other relatives appealed the decision of the administrative judge to the Department of the Interior's Board of Indian Appeals (IBIA). The IBIA affirmed the decision of the administrative judge, and the contesting relatives filed an action challenging the Board's decision in the District Court of Montana against the Secretary of the Interior and the natural son alleging a violation of the fifth amendment due process clause.¹

The issues were (1) whether the federal courts have jurisdiction to review merits of proceedings in which the Secretary of the Interior settled a claim to allotted Indian trust land pursuant to 25 U.S.C. § 372² and 43 U.S.C. § 1464³; and (2) whether the

8. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

9. *Enterprise Management Consultants, Inc. v. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989). The court identified the three factors in *Dry Creek Lodge* as "an alleged violation of the Indian Civil Rights Act, the denial of a tribal forum, and a conflict involving a matter outside internal tribal affairs."

10. *Id.* at 894.

11. *Id.* at 895.

1. The fifth amendment of the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

2. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. § 331 (1982). Title 25, section 372 states in relevant part:

When any Indian to whom an allotment of land has been made, or may hereafter

plaintiffs had a constitutional claim that would except the non-reviewability of heirship under 25 U.S.C. § 372.

The court found that 25 U.S.C. § 371⁴ mandated that the natural son was the heir and agreed with the district court that federal law rather than tribal law controlled the disposition of allotted trust land.⁵ Generally, federal courts do not have jurisdiction to review the Secretary's administrative decision unless a constitutional claim is asserted.⁶ A fifth amendment due process claim qualifies as an exception to the non-reviewability of heirship determinations.⁷

Although the court determined it possessed subject matter jurisdiction to hear the case under 28 U.S.C. § 1331⁸, the unsatisfied relatives were unsuccessful in asserting their consti-

be made, dies before the expiration of the trust period and before the issuance of a fee simple patent without having made a will disposing of said allotment as hereinafter provide, the Secretary of the Interior, upon notice and hearing, and under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

25 U.S.C. § 372 (1982).

3. 43 U.S.C. § 1464 (1982). Section 1464 provides:

The Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses, to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, or by advertisement.

4. 25 U.S.C. § 371. Section 371 states in relevant part:

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provision of section 348 of this title, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child

5. *Kicking Woman v. Hodel*, 878 F.2d 1203, 1205 (9th Cir. 1989).

6. *Id.* at 1207-08.

7. *Id.* at 1206.

8. 28 U.S.C. § 1331. Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

tutional claim because they received adequate notice and had a full opportunity to litigate their claim.⁹ The Ninth Circuit affirmed the lower court's decision upholding the administrative law judge's decision.¹⁰

TAXATION: CIGARETTES

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303 (10th Cir. 1989), cert. granted, 111 S. Ct. 37 (1990); *views of Solicitor General invited*, 588 U.S.L.W. 3693 (U.S. Apr. 30, 1990).

The Oklahoma Tax Commission attempted to assess a cigarette tax on the Citizen Band Potawatomi Tribe (Tribe). The Tribe sold cigarettes in a tribally-owned convenience store located on trust land. Tribal trust land is exempt from state and local taxation pursuant to 25 U.S.C. § 465.¹

The district court granted a preliminary injunction to enjoin the tax commission from enforcing a cigarette tax against the Tribe.² The tax commission filed a counterclaim asking the court to assume jurisdiction, declare that Oklahoma had jurisdiction to tax the cigarette sales, to enforce its tax, and to enjoin the Tribe from selling cigarettes upon which taxes were not collected or remitted.³ The district court denied the Tribe's motion to dismiss holding the counterclaim was a compulsory counterclaim under Rule 13(a).⁴

9. *Kicking Woman*, 878 F.2d at 1208.

10. *Id.*

1. 25 U.S.C. § 465. Section 465 provides in pertinent part:

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

2. *Citizen Band Potawatomi Indian Tribe of Okla. v. Oklahoma Tax Comm'n*, No. CIV-87-0338-W (W.D. Okla. Apr. 15, 1988) (WESTLAW, Allfeds Library, Unpub. Dist. file).

3. *Id.*

4. FED. R. CIV. P. 13(a) provides:

[P]leading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

The Tribe filed a motion for a new trial asserting that Fed. R. Civ. P. 13(a) was not a congressional waiver of their sovereign immunity. The district court denied the motion and the Tribe appealed also claiming error because the district court ruled nontribal members could be taxed. The tax commission cross-appealed claiming the court erred in holding the Tribe and tribal members were exempt from cigarette tax.

The issues before the court were: (1) whether the Tribe waived its sovereign immunity to permit the jurisdiction for the tax commission's counterclaim, and (2) whether the convenience store was "Indian Country" and exempt from state taxation.

"Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress."⁵ The court reasoned that a Tribe filing suit does not waive immunity or consent to suit on a counterclaim.⁶ Further, Rule 13(a) could not be viewed as a congressional waiver.⁷ The court found the district court's assumption of jurisdiction impermissible because it was contrary to the doctrine of sovereign immunity.⁸

The Tenth Circuit also held the denial of the Tribe's request for an injunction was error because the convenience store was located on tribal trust land and was "Indian Country."⁹ The court rejected the argument that the land was "assimilated into the general community of the state" finding that assimilation did not change the status of the tribal land held in trust by the United States.¹⁰

The court emphasized that "Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an

5. *Citizen Band Potawatomi Indian Tribe of Okla. v. Oklahoma Tax Comm'n*, 888 F.2d 1303, 1304 (10th Cir. 1989), *cert. granted*, 111 S. Ct. 37 (1990); *views of Solicitor General invited*, 58 U.S.L.W. 3693 (U.S. Apr. 30, 1990).

6. *Id.* at 1305.

7. *Id.*

8. *Id.*

9. *Id.* at 1305-06. "Indian Country" is defined pursuant to 18 U.S.C. § 1151 (1979) as:

(a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(b) all dependent Indian communities within borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

10. *Id.* at 1306.

independent jurisdictional grant of authority from Congress" and the state did not show any such jurisdiction.¹¹ The court further noted that Oklahoma forewent the opportunity to obtain jurisdiction under Public Law 280.¹²

The Tenth Circuit reversed and remanded the case to the district court for dismissal of the counterclaim and the entry of an injunction for the Tribe.¹³

TAXATION OF REAL PROPERTY

Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989).

California assessed a timber yield tax at the time of harvest on the value of timber that imposed tax on the first nonexempt entity to acquire ownership of felled timber.¹ In 1976, the Hoopa Tribe established a tribal corporation, Hoopa Timber Corporation, pursuant to their tribal constitution.² The Hoopa Timber Corporation processes the timber and sells it to off-reservation companies. The Bureau of Indian Affairs manages the tribal timber³ and sells to both the Hoopa Timber Corporation and other private companies. In October 1982, the Hoopa Tribe filed suit challenging the validity of the California tax to private companies who purchase tribal timber from the BIA or Hoopa Timber Corp.⁴

The issues before the appellate court were (1) whether federal law preempts state activity which interferes with federal policy regarding tribal interest; and (2) whether the tribe was entitled to attorney's fees under 42 U.S.C. § 1983.⁵ The district court granted partial summary judgment on the grounds of federal preemption awarding both damages and prejudgment interest but denied the tribe recovery for attorney's fees.⁶

"Indian lands are exempt from state real property taxes."⁷ The court found that if the state law interferes with federal policy, purpose, or operation involving tribal interests, the state

11. *Id.* at 1306-07.

12. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360).

13. *Citizen Band Potawatomi Indian Tribe of Okla. v. Oklahoma Tax Comm'n*, 888 F.2d 1303, 1307 (10th Cir. 1989).

1. CAL. REV. & TAX CODE §§ 38104-38110 (West 1979).

2. HOOPA TRIBAL CONST. art. IX, § 1(p).

3. See 25 C.F.R. § 163 (1990).

4. *Hoopa Valley Tribe v. Nevins*, 590 F. Supp. 198, 199 (N.D. Cal. 1984).

5. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659-61 (9th Cir. 1989).

6. *Id.* at 663.

7. *Id.* at 659 (quoting *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866)).

law is preempted.⁸ The court distinguished *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698 (1989), because the California tax had no direct connection between the revenues collected and the provision of services to tribal members, California played no role in the tribe's timber activities, and the burden of the tax concededly fell on the tribe.⁹ The state's weak interest did not outweigh the substantial federal and tribal interests in timber harvesting because for the tax to be valid the California tax must bear some relationship to the activity being taxed.¹⁰

The court found that the preemption analysis¹¹ fell outside the scope of 42 U.S.C. § 1983.¹² The Ninth Circuit characterized the assertion of the right to exercise sovereignty (the right to self-government) as a power not a right (such as protecting the personal liberty of its members).¹³ The court reasoned that "the right to self-government is protected by treaty and federal judicial decisions" and not grounded in the Constitution or federal statutes. The Ninth Circuit affirmed the district court's decision on both issues.¹⁴

TRIBAL COURT JURISDICTION: CRIMINAL

Duro v. Reina, 58 U.S.L.W. 4643 (U.S. May 29, 1990).

Albert Duro, a Torres-Martinez Band of Cahuilla Mission tribal member, resided with a Pima-Maricopa woman friend on the Salt River Pima-Maricopa Reservation and was employed by a tribal corporation. Duro allegedly shot and killed a 14-year-old boy, who was a member of the Gila River Tribe, within

8. *Id.* (quoting *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987)).

9. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 660-61 (9th Cir. 1989).

10. *Id.* at 661.

11. The court decided not to analyze the conflicts between state laws and tribal activities under the U.S. Constitution's Indian commerce clause. *Id.* at 662.

12. 42 U.S.C. § 1983 (Supp. IV 1986). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

13. *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989).

14. *Id.* at 663.

boundaries of the Salt River Reservation. Federal agents arrested Duro in California and charged him with murder and aiding and abetting murder.¹ However, the United States Attorney dismissed the federal indictment.

Duro was then placed in the custody of the Pima-Maricopa police officers where he was charged with illegal firing of a weapon on the Reservation. When Duro stood trial in the Pima-Maricopa tribal court, the court denied his motion to dismiss for lack of jurisdiction over the case. Duro filed a writ of habeas corpus in the United States District Court of Arizona naming the tribal chief judge and police chief as respondents.

The district court granted the writ because the assertion of jurisdiction violated equal protection under the Indian Civil Rights Act.² The district court found that the *Oliphant v. Suquamish Indian Tribe*³ decision that tribal courts did not have criminal jurisdiction over non-Indians applied to a nonmember Indian because to do otherwise would constitute race discrimination.⁴ The district court held discrimination existed when the nonmember Indian did not have a right to participate in tribal government similar to non-Indians.⁵

The Ninth Circuit Court of Appeals reversed the district court holding that the distinction between members and nonmembers of the Tribe was "indiscriminate" based on *United States v. Wheeler*.⁶ The Ninth Circuit examined the definition of "Indian Country"⁷ and found that the word, Indians, applied to both tribal and nonmember Indians.⁸ The court found no racial classification and held that Duro could be subject to tribal court jurisdiction⁹ because the Tribe established a rational basis for classification due to the need for effective law enforcement.¹⁰ Further, the court of appeals found that Duro had sufficient "contacts" with the Reservation for the tribal court to assert jurisdiction.¹¹

1. Indian Crimes Act of 1976, Pub. L. No. 949-497, § 1, 90 Stat. 585, 585.

2. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, §§ 201-203, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-1303).

3. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

4. *Duro v. Reina*, 58 U.S.L.W. 4643, 4644 (U.S. May 29, 1990).

5. *Id.*

6. *Duro v. Reina*, 851 F.2d 1136, 1140 (9th Cir. 1987) (citing *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)).

7. *Id.* at 1143.

8. *Id.*

9. *Id.* at 1145-46.

10. *Id.* at 1145.

11. *Id.* at 1144.

The issue before the United States Supreme Court was whether an Indian tribe retains a sovereign power to assert criminal jurisdiction over a nonmember Indian.

The United States Supreme Court reexamined both the holdings of *Oliphant* and *Wheeler*. *Oliphant* held that an Indian tribe did not have criminal jurisdiction over a non-Indian.¹² While the Supreme Court stated that *Wheeler* reaffirmed tribal criminal jurisdiction over crimes committed by tribal members, the Court also explained that tribes could not try nonmembers in tribal courts.¹³ The Supreme court reasoned that tribes retained sovereignty and sovereignty has been held to have occurred . . . [when] involving relations between an Indian tribe and nonmembers of the tribe.¹⁴ The court said that in matters of external relations, however, the tribe had a "dependent status" and criminal jurisdiction could only be extended by delegation of Congress.¹⁵

The Supreme Court acknowledged that their decisions recognized "broader retained tribal powers outside the criminal context."¹⁶ However, criminal jurisdiction involved "far more direct intrusion on personal liberties."¹⁷ The Supreme Court held that for criminal jurisdiction purposes, Duro had the same relations with the Tribe as the non-Indian in *Oliphant*.¹⁸

The Supreme Court discounted the arguments based on the historical record of CFR Court of Indian Offenses¹⁹ possessing jurisdiction over *all* Indians regardless of tribal affiliation.²⁰ To justify the rejection of the broad "Indian" classification, the court relied on the Solicitor's Opinions dating back to 1936²¹ and the personal liberty intrusion rationale.²² The Supreme Court rejected the court of appeals' "contacts" test because implied consent for jurisdiction cannot be deemed from entering an Indian community.²³

The tribe argued that a jurisdictional void would be created precluding essential preservation of law and order on the res-

12. *Duro v. Reina*, 58 U.S.L.W. 4643, 4645 (U.S. May 29, 1990).

13. *Id.*

14. *Id.* at 4646.

15. *Id.* at 4645-46.

16. *Id.* at 4646.

17. *Id.*

18. *Id.*

19. *Id.* at 4646-47.

20. *Id.* See 25 C.F.R. § 11.2(a) (1989).

21. *Duro v. Reina*, 58 U.S.L.W. 4643, 4647 (U.S. May 29, 1990).

22. *Id.* (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)).

23. *Id.* at 4648.

ervation. The Supreme Court responded that the jurisdiction at stake is "over relatively minor crimes" and not any greater than non-Indians crimes.²⁴ Also, the court said the tribes have the power to exclude undesirable persons from their lands.²⁵ Alternatively, the Supreme Court suggested Public Law 280 as a means for the States to assume criminal jurisdiction.²⁶

In conclusion, the Supreme Court reversed the court of appeals' decision holding that an Indian tribe may not assert criminal jurisdiction over a nonmember Indian.²⁷

CONSTITUTIONAL RIGHTS

Department of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990).

A private drug rehabilitation organization fired Alfred Smith and Galen Black, "respondents," for ingesting peyote for sacramental purposes at a Native American Church ceremony. The respondents applied for unemployment compensation benefits at the Employment Division. The Employment Division denied benefits because of work-related "misconduct." The Oregon Court of Appeals reversed because the denial of benefits violated the first amendment free exercise clause.¹

The Oregon Supreme Court affirmed the court of appeals' holding that the respondents were entitled to unemployment benefits because the criminality of the consumption of peyote under Oregon law was irrelevant to the resolution of the constitutional claim.² The Oregon Supreme Court found that the purpose of the Employment Division's "misconduct" provision was to preserve the financial integrity of the compensation, not to enforce the State's criminal laws.³ The purpose of the misconduct provision was inadequate to justify the burden that

24. *Id.*

25. *Id.*

26. *Id.* at 4649.

27. *Id.*

1. *Smith v. Employment Div., Dep't of Human Resources of Oregon*, 709 P.2d 246 (Or. 1986). The first amendment provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievance.

U.S. CONST. amend. I.

2. *Smith v. Employment Div. Dep't of Human Resources of Oregon*, 721 P.2d 445, 450-51 (Or. 1986).

3. *Id.* at 448-51.

disqualification imposed on the respondents' religious practice.⁴

The United States Supreme Court vacated the judgment of the Oregon Supreme Court and remanded for the court to determine whether the religious use of peyote in Oregon was prohibited by state law⁵ so that the U.S. Supreme Court could decide whether the practice is protected by the Constitution.⁶ On remand, the Oregon Supreme Court held that the Oregon state statute prohibited the use of peyote for religious practices and the statute made no exception for sacramental use of peyote.⁷

The issue before the United States Supreme Court was whether the Oregon state statute prohibiting the religious use of peyote is permissible under the first amendment free exercise clause.

The U.S. Supreme Court rejected the respondents' argument that the *Sherbert v. Verner*⁸ balancing test should be applied to invalidate the Oregon statute because the cases that used the test did not involve criminal prohibition on a form of conduct.⁹ The court noted unemployment compensation cases had a distinct feature that involved the particular circumstances behind the applicant's unemployment.¹⁰

The U.S. Supreme Court stated that unless an exception was provided in the Oregon statute, citizens have no private rights "to ignore generally applicable laws."¹¹ Allowing citizens to be excused because of contrary religious beliefs would be permitting the "professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."¹²

The U.S. Supreme Court concluded it was not a constitutional requirement to exempt a "nondiscriminatory religious practice."¹³ The court found the Oregon statute constitutional and

4. *Id.* at 449.

5. Employment Div., Dep't of Human Resources of Oregon v. Smith (*Smith I*), 485 U.S. 660, 673-74 (1988).

6. *Id.*

7. Employment Div., Dep't of Human Resources of Oregon v. Smith, 763 P.2d 146, 148 (Or. 1988).

8. *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Sherbert* test balanced the governmental actions that substantially burdened a religious practice with the compelling governmental interests. *Id.* at 402-03.

9. Department of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433, 4436-37 (U.S. Apr. 17, 1990).

10. *Id.* at 4436 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

11. *Id.* at 4437.

12. *Id.* at 4435 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).

13. *Id.* at 4438.

consistent with the first amendment free exercise clause, thus denying the unemployment compensation benefits.¹⁴

14. *Id.*

